

PRIVY COUNCIL REPORT

MALAYAN ARMED FORCES CO-OPERATIVE HOUSING SOCIETY LIMITED v. NANYANG DEVELOPMENT (1966) SDN. BHD.

[P.C. (Lord Wilberforce, Viscount Dilhorne,
Lord Hailsham of Saint Marylebone, Lord Keith of Kinkel and
Lord Scarman) November 13 and December 20, 1978]

[Privy Council Appeal No. 10 of 1977]

*Contract — Building Contract — Construction of —
Cost of laying water mains and of electric supply.*

This was an appeal from the decision of the Federal Court (reported in [1976] 2 M.L.J. 12) which had dismissed an appeal from the High Court and held that the appellant society was liable to pay for the cost of laying water mains and of laying electrical wires along the roads leading to the various houses bought by the society from the respondents. A clause in the building agreement provided that all costs of making water and electricity connections "inclusive of the cost of laying water mains and of electric supply and metering thereof" were to be borne and paid by purchaser.

Held, dismissing the appeal: (1) even if the clause had not contained the words "inclusive of the cost of laying water mains and of electric supply" the conclusion would none the less be inescapable that the cost of doing so was part of the cost of making those connections. The fact that those words were in the clause removed any doubt if room for doubt there be, that the clause provided that the appellants should pay all the costs of laying mains and cables to the houses;

(2) the respondents were therefore entitled to recover from the appellants the cost of laying water mains and cables on the estates to connect their houses with the mains and cables of the suppliers of water and electricity.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

Hugh Francis Q.C. and Raja Abdul Aziz Addruse for the appellants.

Geoffrey Rippon and R.T. Khoo for the respondents.

Viscount Dilhorne (delivering the judgment of the Board): In 1966 the respondents were engaged in developing sites at Gombak and Ampang for housing. The layout plan for the Gombak housing estate provided for the building of 385 houses and that for the Ampang housing estate of 110 houses. The Gombak site covered 49 acres. Each layout plan made provision for roads giving access to the houses.

In March and August 1966 the appellants entered into agreements with the respondents for the purchase of 117 houses on the Gombak estate and 65 houses on the Ampang estate. In the end they bought 143 houses on the Gombak estate. The terms of each agreement were in all material respects the same.

In September 1971 the appellants started proceedings for the recovery of a large sum of money which they alleged they had overpaid for the houses. In their defence and counterclaim the respondents alleged that they were entitled to deduct various sums from the amount which it was alleged they had been overpaid and they counterclaimed for those sums.

The action was settled but it was one of the terms of the settlement that the respondents' counterclaim should be limited to their claim to be entitled to be paid by the appellants the costs incurred by them in relation to the supply of water and electricity to the houses bought by the appellants and to the cost of maintaining roads and drains.

A The respondents later abandoned their claim in respect of the maintenance of roads and drains. So the only question to be determined in this litigation is whether the respondents' claim in relation to the supply of water and electricity is well founded. Abdul Hamid J. held that it was and his decision was upheld by the Federal Court of Malaysia.

B Clause 8 of each agreement reads as follows:—

"The company further undertakes to apply on behalf of the purchaser for the connection to the said houses of such water and electrical services as are provided by the local authority but all costs of the making of such connections inclusive of the cost of laying water mains and of electric supply and metering thereof shall be borne and paid by the purchaser."

C Scheduled to each agreement was a layout plan which showed the plots on which houses were to be erected and the roads on the estate giving access to the houses. Unfortunately these layout plans which, by clauses of the agreements, were to be "taken read and construed as an integral part of" the agreements were not produced at the trial. Layout plans were produced at the trial and, apart from the colour the lots bought by the appellants were painted, their Lordships were told that the plans were the same as those scheduled to the agreements. The layout plans produced showed the position of the water mains on each estate which served the houses bought by the appellants. The layout plan of the Gombak estate produced showed a pump house on what appears to be the north-west corner of the estate with a rising main leading from there and running along a road on the estate to an elevated tank on the north-east corner of the estate and supply mains from the tank running along the road to the appellants' houses and along the road opposite those houses. Save where a supply main passed houses not bought by the appellants on the way to a house or houses they had bought, the layout plan did not show the mains serving the houses not bought. The layout plan of the Ampang estate produced also showed the supply mains serving the houses bought by the appellants on that estate. In the course of the argument, however, it emerged that the layout plans scheduled to the agreements did not have marked on them the mains shown on the layout plans produced and consequently, in construing Clause 8 of the agreements, their Lordships ignore the fact that the plans produced at the trial had the mains marked on them.

H The issue to be determined was concisely and accurately stated by Suffian L.P. as whether by virtue of Clause 8 the appellants should "pay for connecting the water and electricity supply" to the houses they had purchased "up to the lot boundaries only", that is to say, for connecting from the lot boundaries to the mains, "or should" they "pay also for laying water mains and electricity wires along the roads leading to these houses".

I Although it may have been usual in 1966 in Malaysia for a developer of a housing estate to lay and pay for the laying of water mains and electric cables along the roads of an estate — the cost incurred no doubt being reflected in the purchase price of the houses — there was nothing then to prevent a purchaser of houses from agreeing to pay the cost of connecting the houses bought to the water mains and

electric cables of the bodies supplying water and electricity.

Clause 8 commences with an undertaking by the respondents to apply for the connection of the appellants' houses to the mains and cables of those bodies. It then goes on to provide that *all the costs* of making those connections are to be borne by the appellants. To enable those houses to be so connected, water mains and cables were laid along the roads of each estate and the cost of laying the mains and cables for that purpose was part, and no doubt the main part, of the cost of connecting the houses to the mains of the water suppliers and to the cables of those who provided electricity.

In their Lordships' view, if Clause 8 had not contained the words "inclusive of the cost of laying water mains and of electric supply", the conclusion would none the less be inescapable that the cost of doing so was part of the cost of making these connections. The fact that those words are in the clause removes any doubt, if room for doubt there be, that the clause provided that the appellants should pay all the costs of laying mains and cables to their houses.

In the course of the argument Mr. Francis for the appellants drew attention to a number of clauses in the agreements. In their Lordships' opinion there is nothing in the rest of the agreements to support the conclusion that the clear and unambiguous language of Clause 8 should be given a different meaning to that it *prima facie* bears. Abdul Hamid J. attached some significance to Clause 5 but he did not regard that clause as affecting the meaning to be given to Clause 8. Their Lordships agree. Mr. Francis attached significance to Clause 12 of the Gombak agreement (Clause 13 of the Ampang agreement). That clause provided that possession of each of the houses bought should be given on completion of the building "and upon the Purchaser having duly paid to the Company all moneys equal to the full value of such houses and the Purchaser having duly complied with the terms and covenants on its part to be observed" It was contended that if the respondents' contention was correct, this clause could not operate on completion of the houses for it was said that the cost of laying mains and cables could not be ascertained until the infrastructure was complete over the whole of the 49 acres of the Gombak estate and the whole of the Ampang estate. Their Lordships do not agree, for the clause does not provide that the appellants should pay a proportion of the total cost of laying mains and cables over the whole of each estate but that they should pay all the cost of connecting their houses to the mains and cables of those who supply water and electricity.

Further, while the word "pipes" may include "mains" it is not true to say that "mains" covers all pipes. The label "mains" is inapt to describe the pipe leading from a main in the road to a house. A main usually serves more than one place. If the appellants' contention was correct and the pipe leading from a main in the road to a house is not a main, there would be no "mains" to which Clause 8 would apply.

In their Lordships' opinion the respondents are entitled to recover from the appellants all the cost

A of laying water mains and cables on the estates to connect their houses with the mains and cables of the suppliers of water and electricity.

Their Lordships will advise His Majesty the Yang di-Pertuan Agong that the appeal be dismissed with costs.

Appeal dismissed.

B Solicitors: Coward Chance; Philip Conway Thomas & Co.

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